

OUTSIDE COUNSEL

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Junk Science Hearings: Timing Is Everything

While junk science challenges to potential expert testimony had their genesis in federal court with the seminal case of *Frye v. United States*,¹ the doctrine has more recently been applied to New York State Court products litigation in *Selig v. Pfizer, Inc.*² and medical malpractice litigation in *Lara v. NYC Health & Hospitals*.³

It has transformed the judiciary from observer to active participant in the administration of justice. Because of procedural differences between the two judicial systems the transition has not been an altogether smooth one. Unlike the federal courts in which a particular judge typically supervises discovery and then presides over the trial, the Trial Assignment Part (TAP) of the New York State Court system⁴ frequently results in the assignment of a Justice, who has little or no knowledge of either the substantive or the procedural history of a case, to preside over the trial of a matter with which they are not familiar.

In federal court, motions in limine are an integral part of the procedural development of a case, and are governed by Rule 104(a) of the Federal Rules of Evidence.⁵ No such rule or procedural mechanism is formally available in state court.

Oftentimes in state court, the parties are unaware of the identity of the trial judge until after jury selection has been completed. Motions in limine are first solicited at that time, leaving counsel without guidance in terms of how to approach jury selection or what evidence will likely be introduced at trial.

The lack of a uniform procedure for timing of disclosure of experts between departments further complicates matters by leaving the timing of *Frye* motions in a state of uncertainty.⁶

Because *Frye* motions are dependent on an understanding of plaintiff's causation theory and because New York is one of the few states that does not permit depositions of experts in medical malpractice cases, it is often difficult for a defendant to adequately evaluate plaintiff's theory of causation and develop the necessary arguments for a *Frye* motion during discovery or at any time prior to receipt of plaintiff's expert disclosure, which in medical malpractice cases may be well after the filing of the Note of Issue. In some instances the particulars of plaintiff's theory of cau-



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sation can not be discerned until it is revealed in plaintiff's opening statement.⁷

Summary Judgment

Recent rules in the New York State Courts limit the timing of summary judgment motions to between 60 to 120 days of the filing of the Note of Issue depending upon the department in which the case is located.⁸ For example, Kings County Supreme Court Civil Term Rule 13 states that summary judgment motions shall be filed no later than 60 days after the Note of Issue is filed. Because §3101(d) disclosure can at times be vague and unenlightening, the defense on occasion will move for summary judgment, not necessarily with dismissal in mind, but rather to obtain more definitive discovery concerning plaintiff's

causation theory. It is often only upon receipt of the plaintiff's opposition to a motion for summary judgment containing a physician's affidavit detailing plaintiff's position, that the true nature of plaintiff's causation argument is revealed and can effectively be evaluated. In order to successfully oppose a defendant's summary judgment motion, plaintiff's expert will typically need to supply an affidavit that will raise a question of fact as to causation.

On occasion this affidavit, submitted on behalf of plaintiff, is not supported or supportable by any scientific or medical literature. One appropriate response to an affidavit that raises a question of fact, but is lacking foundation in scientific or medical literature, is to request through the reply affidavit to convert the Summary Judgment motion into a request for the alternative relief of a *Frye* hearing on the causation position that has now been articulated in opposition to the motion for summary judgment.

Timing and Procedural Uniformity

When federal courts grant *Frye* hearings they typically schedule them prior to trial.⁹ There has been very little uniformity, however, among the trial courts and special term in New York State in this area. Some courts are quick to defer or deny *Frye* hearings until after an expert has testified at trial, while many courts will wait until a verdict has been rendered, since a hearing held prior to verdict may turn out as a result of the verdict to be unnecessary. While it would appear that judicial economy would be better served by holding a dispositive hearing prior to trial if it could potentially obviate the need for a trial, often the application for a *Frye* hearing is referred by the assignment judge to the trial judge who is not assigned until after jury selection¹⁰ and the

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trial judge is left with the unattractive prospect of holding a hearing while the jury, having already been selected, is left waiting. There has been quite a bit of procedural inconsistency in this area with some applications for *Frye* hearings being referred by the TAP judge to the trial judge,¹¹ while at other times they have been deferred by the trial judge until after the verdict.¹² Indeed at times, trial judges have held that an application for a junk science hearing made to them, as opposed to the TAP judge, has been waived for failure to raise it at an earlier point in time.¹³

One argument that has often been offered by plaintiffs and on occasion accepted by the judiciary for deferring the hearing until after the verdict is that a hearing prior to trial would permit the defense to obtain the otherwise unavailable discovery of plaintiff's expert.

This rationale misperceives the objective of *Frye* in creating a role for the judiciary as gatekeeper against junk science and does not take into account the amount of time and money that is spent defending a matter that perhaps should have been dismissed at a much earlier point in time.

The purpose of a *Frye* hearing is to evaluate the scientific literature allegedly forming the basis of plaintiff's expert's causation position. Thus the court can minimize any abuse of the hearing as a vehicle for obtaining inappropriate discovery. Indeed, the plaintiff need not produce the expert he intends to use at trial, nor should the defense be permitted to delve into the specifics of the expert's opinions, other than to focus on whether literature supports plaintiff's causation theory.

The notion that the defense will garner some unfair advantage by being permitted to obtain otherwise unavailable discovery seems largely misplaced.

It is particularly ironic that this argument is made in New York, one of the few jurisdictions in which the plaintiff can depose the defendants on the subject of causation and frequently require them to provide through the defendant's testimony a detailed preview of the defense theories on causation, but the defendant cannot depose plaintiff's expert witnesses and is relegated to the deposition of a lay plaintiff; which is typically unenlightening on issues of causation.

The empiric experience as a result of *Frye* hearings has been that certain experts who have in the past advocated baseless causation theories and have consequently had their testimony disallowed, have subsequently refused to become involved in cases in which frivolous causation arguments may again be questioned via a *Frye* hearing. This suggests a salutary and truth furthering effect of such hearings, a policy that is encouraged in a variety of other evidentiary contexts and areas.¹⁴

Proposal

While the response to this dilemma may be legislative, the courts maintain the inherent authority to fashion uniform rules¹⁵ and each court reserves authority over its own calendar relating to such timing and availability of such hearings. A framework tying the timing of a *Frye* hearing to service of plaintiff's §3101(d) disclosure, and requiring the TAP judge, rather than the trial judge, to address these issues would permit these issue to be resolved prior to jury selection. This would avoid the prospect of a hearing while a recent-

ly selected jury is waiting for trial or worse, a lengthy, costly and potentially unnecessary trial resulting in a verdict that is then overturned as the result of a hearing.

Cases involving scientific and medical issues tend to cost the litigants, taxpayers, jurors and the judiciary, large amounts of time, effort, and expense. Nowhere is the notion that justice delayed is justice denied, more prescient than in the context of a claim wholly unsupported by any scientific foundation that is permitted to slowly wind itself through the litigation process only to be undone after a verdict as the result of a post trial hearing.¹⁶

Permitting such cases to proceed through the various stages of litigation through trial, without any screening, because of a systemic and traditional, but ill-conceived reluctance to scrutinize the legitimacy of such claims at the earliest point in time is unfortunate and should not be standard procedure.

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1. *Frye v. United States*, 293 F 1013 (1923)
2. *Selig v. Pfizer, Inc.*, 290 AD2d 319 (2002)
3. *Lara v. NYC Health & Hospitals Corp.*, 2003 WL 21171497 (N.Y. Sup.)
4. Trial Assignment Part of New York State Unified Court System assigns cases for trial.
5. *Luce v. United States*, 469 US 38, 41 n. 4 (1984)
6. CPLR §3101(d)(1)(i) See, for example, N.Y. Unif. Tr. Ct. Rule §202.17(h)
7. *Lara v. NYC Health & Hospitals Corp.*, 2003 WL 21171497 (N.Y. Sup.)
8. CPLR §3212(a)
9. *Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Group*, 937 FSupp 276, 283 (SDNY 1996)
10. This is particularly the case in venues in which there is one medical malpractice trial assignment justice through which all cases are funneled.
11. *Delgado v. Markwort Sporting Goods Co.*, 2006 WL 852116 (N.Y. City Civ. Ct.)
12. *Lara v. NYC Health & Hospitals Corp.*, 2003 WL 21171497 (N.Y. Sup.)
13. *Deluccia v. Sound Shore*, Index No.: 15747/1999
14. *Tran v. New Rochelle Hospital Medical Center*, 99 NY2d 383, 756 NYS2d 509 (2003).
15. CPLR §3101(d)(1)(i) See, for example, N.Y. Unif. Tr. Ct. Rule §202.17(h)
16. *Selig v. Pfizer, Inc.*, 290 AD2d 319 (2002).